STATE OF MICHIGAN

COURT OF APPEALS

THOMPSON-MCCULLY COMPANY, Plaintiff-Appellee,	UNPUBLISHED February 14, 2006
v	No. 257011 Oakland Circuit Court
THE STORAGE OASIS, L.L.C., Defendant-Appellant,	LC No. 02-037380-CH

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff a judgment with costs, interest, and attorney fees, and granting plaintiff foreclosure of its construction lien. Defendant also takes issue with the trial court's order denying defendant's motion for summary disposition. We affirm.

Defendant first contends that the trial court erred in determining that plaintiff was exempt from providing a notice of furnishing under the direct-dealing exception in the Construction Lien Act (CLA), MCL 570.1101, *et seq.* We disagree. "On appeal following a bench trial, a trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. A finding is clearly erroneous when, although evidence supports it, the appellate court is left with a firm conviction that the trial court made a mistake." *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002) (citations and punctuation omitted).

The CLA provides that "a subcontractor or supplier who contracts to provide an improvement to real property shall provide a notice of furnishing to the designee and the general contractor . . . ." MCL 570.1109(1). However, "[a] contractor is not required to provide a notice of furnishing to preserve lien rights arising from his or her contract directly with an owner or lessee." MCL 570.1109(1). The CLA is "designed to protect the rights of lien claimants to payment for expenses and to protect the rights of property owners from paying twice for these expenses." *Solution Source, Inc v LPR Associates Ltd Partnership*, 252 Mich App 368, 373-374; 652 NW2d 474 (2002). The CLA shall be "liberally construed to secure the beneficial results, intents, and purposes" of the act. MCL 570.1302(1). Substantial compliance with the CLA is sufficient to meet provisions of part one of the CLA; however, the CLA's clear and unambiguous requirements should not be ignored. *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997).

In *Vugterveen Systems, supra* at 131, our Supreme Court held that the requirement that a subcontractor provide a notice of furnishing should be subject to the substantial compliance provision of MCL 570.1302(1). The Court ruled that a subcontractor substantially complied with MCL 570.1109(1) when it failed to serve a timely notice of furnishing, but had a representative meet with the property owner and orally supply the information that would be required in a notice of furnishing. The Court noted that, pursuant to MCL 570.1109(4), "A notice of furnishing requires a contractor to identify itself, describe the work it is to perform, and describe the property to be improved." *Id.*

In this case, the trial court liberally construed MCL 570.1109(1) and found that plaintiff substantially complied with the notice of furnishing requirements in MCL 570.1109(1), and/or substantially complied with the direct-dealing exception in MCL 570.1109(1). Plaintiff's area managers, Devin Rau and Julie Huston, both stated that they introduced themselves to one of defendant's owners, Byron Lang and told Byron they were with plaintiff and that plaintiff would be doing the paving work on defendant's property. Furthermore, John Piccirilli, who works for Atlantis Construction, Inc. (Atlantis), stated that he introduced Rau to Byron and told Byron that Rau was with plaintiff and that plaintiff would being doing the paving work on defendant's property. Piccirilli also stated that he was positive that defendant's owners, Doug Lang and Byron, both knew that plaintiff was going to do the paving work on defendant's property. Doug and Byron were both present while plaintiff was paving defendant's property. Defendant even provided coffee and doughnuts to plaintiff's paving crew. On the basis of this record, we conclude that the trial court did not commit clear error when it found that plaintiff complied with MCL 570.1109(1).

Defendant next contends that the trial court erred when it denied its motion for summary disposition. Defendant specifically argues that plaintiff's construction lien was invalid because plaintiff failed to attach a proof of service of a notice of furnishing as required by MCL 570.1111(1)(4). We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

MCL 570.1111(1) provides that, notwithstanding MCL 570.1109:

> the right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material for the improvement . . . a claim of lien is recorded in the office of the register of deeds for each county where the real property to which the improvement was made is located.

MCL 570.1111(4) further provides that, "A claim of lien by a subcontractor, supplier, or laborer shall have attached to it a proof of service of a notice of furnishing described in section 109."

As discussed above, there was evidence of direct-dealing and substantial compliance with the notice of furnishing requirement. If a notice of furnishing was not required under these circumstances, it follows that a proof of service of a notice of furnishing is not required either.

Because the trial court correctly determined that a genuine issue of material fact existed regarding whether there was direct dealing or substantial compliance, the trial court did not err in denying defendant's motion for summary disposition.

Defendant also contends that the trial court erred when it admitted Piccirilli's deposition into evidence. We disagree. We review a trial court's decision to admit evidence under a hearsay exception for an abuse of discretion. *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996).

MCR 2.308(A) provides that depositions or parts thereof shall be admissible at trial only as provided in the Michigan Rules of Evidence. The Michigan Rules of Evidence provide for the admission of deposition testimony taken in compliance with the law, in the same or another proceeding, if the party against whom the testimony is offered or a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, re-direct or cross examination, and the declarant is unavailable as a witness. MRE 804(b)(5). In pertinent part, MRE 804(a)(4) provides that a witness is unavailable if he is unable to testify at trial "because of death or then existing physical or mental illness or infirmity." MRE 804(a)(4) does not specify whether a witness's unavailability must be procured by his own "death or then existing physical or mental illness."

At trial, plaintiff's counsel offered Piccirilli's deposition testimony in lieu of his live testimony. Plaintiff's counsel asserted that Piccirilli was unavailable to testify because he had to take his ill wife to the doctor. Defendant's counsel had cross-examined Piccirilli during the deposition in question. We conclude that the trial court did not abuse its discretion when it admitted Piccirilli's deposition testimony into evidence.

Defendant finally contends that plaintiff is not entitled to the benefits afforded to a subcontractor under the CLA because Atlantis had no right under its asphalt contract to subcontract its work. We disagree.

The contract between Atlantis and defendant was silent on whether Atlantis was permitted or prohibited from subcontracting any of the work required under the contract. But regardless of whether Atlantis was allowed to subcontract, plaintiff is entitled to the benefits of the CLA because MCL 570.1107(1) grants a construction lien to each "contractor, subcontractor, supplier, or laborer who provides an improvement to real property . . . upon the interest of the owner . . . who contracted for the improvement to the real property." MCL 570.1107(1) provides the right to a construction lien to any party who provided improvement to real property. Thus, even if plaintiff was not a proper subcontractor, it still had a right to a construction lien because it provided improvement to defendant's property. And defendant, who contracted with Atlantis to do the work, was aware of the improvement plaintiff provided.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly